85-1420

No.

Supreme Court, U.S.
FILED
FEB 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CURTIS E. DIXON,
Petitioner

v.

CITY OF WINSTON-SALEM, N.C., *et al.*,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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55 pp

QUESTIONS PRESENTED

1. Whether a public employer's policy of promoting white employees because they are cronies constitutes racial discrimination in violation of Title VII of the Civil Rights Act of 1964?

2. Whether a public employer's policy of relying on word of mouth recommendations in promotion of staff violates Title VII of the Civil Rights Act of 1964?

3. Whether a trial court's findings of fact are clearly erroneous in violation of the clearly erroneous standard of review when there is no factual evidence in the record to support it?

4. Whether a trial court's findings of fact of no discrimination are clearly erroneous in violation of the clearly erroneous standard of review when documents or objective evidence contradict the witness' story?

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

W. Steven Allen, Esquire, on behalf of Curtis E. Dixon, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-3a) is not reported. The opinion of the district court (App. 6a-28a) is not reported.

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* The other parties to this case are respondents, Orville W. Powell, A. R. Beaty, and T. W. Fredericks who were sued individually and in their representative capacities as officers of the City of Winston-Salem, North Carolina, and Wayne A. Corpening, Larry D. Little, Vivian H. Burke, Virginia K. Newell, Eugene F. Groce, Robert A. Northington, Jr., Ernestine Wilson and John J. Cavanaugh, Members of the Board of Alderman of the City of Winston Salem.

JURISDICTION

The judgment of the Court of Appeals (App. 2a) was entered on November 27, 1985. The judisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTES AND POLICIES INVOLVED

1. 28 U.S.C. Sec. 1254(1) provides:

1254. Courts of Appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment of decree;

2. 42 U.S.C. Sec. 1981 provides:

1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

3. 42 U.S.C. Sec. 1983 provides:

1983. Civil Action for Deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4. 42 U.S.C. Sec. 2000(e)(2)(a) provides in relevant part:

Sec. 2000e-2. Discrimination because of race, color, religion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

5. 42 U.S.C. Sec. 2000e-3(a) provides:

Sec. 2000e-3. Other unlawful employment practices

(a) Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding, or hearing. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title (42 U.S.C.S. Sec. 2000e-17), or because he has made a charge, testi-

fied, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title (42 U.S.C.S. Sec. 2000e-2000e-17).

Article I of the Personnel policies of the City of Winston Salem, provides in pertinent part:

Sec. 1. Equal Employment opportunity.

Employment practices in city government shall at all times adhere to the spirit and letter of federal, state and local laws, rules and regulations, promulgated thereunder guaranteeing equal employment opportunities to all persons without regard to race, creed, color, sex, handicap, age or national origin.

Persons noted above will receive impartial consideration for initial employment and promotion; will possess equal standing and security as city employees; and will have equal opportunity to receive training, develop skills and opportunities to advance. Such opportunities shall be limited only by the individual's abilities and the requirements of the work force.

Section 3 of Article I of the Personnel policies of the City of Winston Salem provides:

Sec. 3. Recruitment for appointments.

(a) It is the policy of the city to fill vacancies in the city service on the basis of merit and ability. Whenever possible, and insofar as it is in the interest of the city to do so, the "promote-from-within" policy of promoting city employees to higher positions will be followed subsequent to internal vacancy announcement. The personnel director has the responsibility of assisting in recruiting qualified candidates for city employment and of maintaining records which will facilitate the discovery of city employees who should be considered for promotion to higher positions, or for training opportunities which may accomplish the same purpose. No direct or implied commitment to appoint any individual is to be made by any

appointing official until all employment procedural and policy requirements have been satisfied in conjunction with the personnel office and in accordance with city personnel resolutions. Exceptions to this policy shall be made only by the office of the city manager and, in such cases, announcement of appointments will be published in the same manner as position vacancy announcements.

STATEMENT OF THE CASE

1. In 1964, Congress enacted the Civil Rights Act of 1964. Title VII of the Civil Rights Act's purpose is to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.

42 U.S.C. Sec. 1981 was enacted to provide black citizens with the same rights as white citizens to make and enforce contracts and to secure the benefits of equal citizenry in our country and prevent individuals from discriminating on account of race.

42 U.S.C. Sec. 1983 was enacted to provide a means of redress to protect the constitutional rights of citizens who might be denied vigorous enforcement of their rights in state courts on the account of their color.

2. On September 12, 1979, Petitioner filed this suit in the United States District Court for the Middle District of North Carolina challenging respondent city's promotion practices and failure to promote blacks in general, and petitioner specifically.[1] (C.A. App. at 11-21; 35-36)

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[1] In 1961, Petitioner received a B. S. Degree, Magna Cum Laude, in Mathematics from North Carolina A&T State University, Greensboro, North Carolina, and a Masters Degree in Mathematics from A&T in 1973. Between the years 1974-77, he completed 36 hours toward a doctoral degree in Administration at the University of North Carolina at Greensboro, N.C. In 1979, he received a Masters

Respondent's personnel policy provided for equal employment opportunity in initial employment, training, development of skills, and opportunities to advance.[2] (C. App. at 602-614) It further provided that respondent would fill vacancies in the city on the basis of merit and ability and a promote from within policy. Exceptions to the policy could be made by the City Manager. Respondent also had in effect an Affirmative Action Program to recruit and promote minorities. (C.A. App. at 632-654). In June 1972, respondent appointed Gary Brown, a white male, as evaluation director. (C.A. App. at 70) Petitioner, a black male, had performed the identical duties assumed by Gary Brown but had not been considered by respondent for the position. (C.A. App. at 155). In 1977, Gary Brown was appointed to a new position and Allen Joines, a white male, was appointed by the City Manager as evaluation director. (C.A. App. at 71) The vacancy had not been advertised and petitioner had not been considered. (C.A. App. at 71). In July of 1978, respondent merged its budget and evaluation office. Allen

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Degree in Public Affairs from the University of North Carolina at Greensboro. He began his employment with the City of Winston Salem, in 1970. Prior to 1970, Petitioner was a Captain in the United States Air Force where he served as Chief Maintenance Officer, Communications Officer, and Commander of a Communications Detachment. Petitioner received the Bronze Star Medal for leadership service in Vietnam. After receiving an honorable discharge, Petitioner served as Director of Operations and Training for the Concentrated Employment Program in the City of Winston Salem. In 1970, he was hired as Program Evaluation Officer for the City where he served as Deputy Director of the Model Cities Program and served as director of its evaluation function. From 1972 to 1978, he served as Senior Program Analyst and developed internal management and project evaluation systems.

[2] At trial, Petitioner challenged the City's failure to appoint or consider him for Evaluation Director (1972), Evaluation Director (1977), Budget/Evaluation Director (1978), Public Safety Coordinator (1978), Acting Director of Human Services Department (1979), Community Development Coordinator—2 positions (1978) Human Services Director (1980); City Secretary (1980).

Joines, the evaluation director was appointed to Public Safety Coordinator. Joines had served as staff to a committee appointed to study the public safety concept and the City Manager, upon the recommendation of the chairman of the committee, a white male, had made the appointment. (C.A. App. at 73-74) The position was not advertised and petitioner was not considered. Recommendations by black persons for position vacancies were ignored by the city manager. (C.A. App. at 569-570) Tom Fredericks, a white male, the director of the budget office was appointed director of the merged budget/evaluation office. In August 1978, Gary Brown assumed the duties as Director of Community Development. (C.A. App. at 74) Petitioner applied for four positions in the new department, but was not considered. (C.A. App. at 86) Joe Sauser, a white male, was appointed as Assistant Director of Community Development/Program Development and Control. Fran Clark, a white female, was appointed as Program Development and Evaluation Coordinator. On July 7, 1978, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission. (C.A. App. at 79) Thereafter, respondent's office location repeatedly changed. His telephone number changed thirteen times. (C.A. App. at 203-204) Finally, petitioner was assigned solitary office space in a storage room, six by six for 11 months where he was surrounded by boxes. (C.A. App. at 229-230) And petitioner was denied the right to attend a two hour professional meeting when other employees within the office were allowed several days off for professional reasons. In October 1979, the respondent's Human Services Department Director resigned. (C.A. App. at 189) Walter Farabee, a black male who had been relieved of his former duties as Director of Economic Development in January 1979 was appointed as Acting Director by the respondent's Acting City Manager. (C.A. App. at 192) Petitioner applied but was not considered because it was thought he

would be an applicant for the permanent position. (C.A. App. at 111-112) Farabee was later appointed to the permanent position by respondent's new city manager because he thought he was the best qualified candidate. Petitioner had applied and had been considered. (C.A. App. at 78)

After filing of amended and supplemental pleadings, the matter was heard before the district court. The district court found no discrimination. The court found that Gary Brown had been selected as evaluation director because of his familiarity with respondent's deputy city manager, John Bond, a black male. (C.A. App. at 70) The advancements of Allen Joines were simply put because he was the city manager's ally or crony.[3] (C.A. App. at 84) That Tom Fredericks was appointed as budget director when due to tight fiscal constraints the evaluation office became somewhat of a luxury. (C.A. App. at 73) and for all practical purposes there was never a vacancy.[4] After the merging of the budget and evaluation office, Allen Joines became a displaced department head, and after consultation with Al Beaty, respondent's black personnel director, Joines was chosen as Public Safety Coordinator (C.A. App. at 74). The appointment of Joe Sauser as Assistant Director Community Development/Program Development and Control was understandable because while less versatile than plaintiff, he had greater level of familiarity and expertise in the community development area. Gary Brown had selected Joe Sauser due to his direct experience not race. (C.A. App. at 75) Likewise, Brown had chosen Fran Clark, a white female, because she was the best candidate. (C.A.

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[3] Orville Powell, City Manager, testified he appointed Allen Joines as Evaluation Director in 1977 because he had served on his staff and handled a lot of different assignments well and was worthy of the appointment. He did not consider plaintiff (C.A. App. at 473).

[4] Fredericks salary increased after being promoted to Budget/Evaluation Director. (C.A. App. at 408).

App. at 75) Even if Clark was only a CETA participant, that did not make her less qualified than petitioner (C.A. App. at 76). Race was not a factor in her selection. (C.A. App. 76). The appointment of Walter Farabee was filled on an acting basis only. Farabee was selected upon the recommendation of Joe Herman Berrier, respondent's Assistant City Manager over the Human Services Department (C.A. App. at 77). Petitioner's testimony that Lewis Cutright, the respondent's Acting City Manager, told him he could not be offered the position because of his lawsuit was not indicia of retaliation. (C.A. App. at 77-78) Farabee's permanent appointment as Human Services Director was not tainted by retaliatory or discriminatory intent (C.A. App. at 78). The court found no retaliation and that renovations to city hall and plaintiff's own job changes resulted in the office and telephone number changes (C.A. App. at 79) On Appeal, the Fourth Circuit Court of Appeals affirmed finding that the district court's findings were not clearly erroneous and that there was no error of law.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the future viability of equal employment opportunity for blacks and other minorities in the public sector. The issue presented is a direct opportunity for the court to define the contours of devices that may or may not be used to limit the advancement of minorities into the upper tier of management. In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), this Court first recognized Congress' purpose to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which tended to relegate certain Americans to the low and most undesirable positions in the market place. Recent job statistics indicate that the job plight of the majority of black Americans has not advanced but worsened since implementation of affirmative action programs. In the last decade, black Americans

have become not only underemployed but unemployed. Over forty percent of young black Americans in the urban areas are unemployed. Blacks still do not, by and large, hold upper or middle management positions in significant numbers. The opportunity to equality of opportunity in the job market is certainly no less a right than the right to equality of education recognized by this court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Today, in America, the ability to earn a livelihood is synonymous with the living of a "meaningful" life. For life, without a means of support is no life at all.

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973), established that Congress required the removal of all artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications. The question presented here is whether "cronyism" is an "impermissible" classification. This question was last visited by this Court in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978). In *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978), this court held that an employer need not adopt a hiring procedure that maximized hiring of minority employees, and need only prove that it based its employment decision on a legitimate consideration, and not an illegitimate one such as race. In *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978), the employer hired only persons it knew to be experienced and competent in the type work or persons who had been recommended to it as similiarly skilled. The court was not presented the question in the same manner presented here.

In *Lamphere* v. *Brown University*, 684 F.2d 743 (1st Cir. 1982) the First Circuit Court of Appeals held that "friendship" as the basis of selection does not constitute an illegitimate basis of employment or denial of employment under Title VII of the Civil Rights Act of 1964. In *Bonilla* v. *Oakland Scavenger Co.*, 697 F.2d 1297

(9th Cir. 1982) the Ninth Circuit Court of Appeals in an analogous situation held that Title VII applied. Acceptance of cronyism as a legitimate exception to the applicability of Title VII of the Civil Rights Act of 1964 would seriously undermine its efficacy. It is because whites preferred to work, to live, to go to school with, even to be buried only with other whites that the Civil Rights Acts were implemented. This court should allow certiorari in order to resolve this significant question.

2. Respondent, the City of Winston Salem had in effect at all relevant times a personnel policy that called for equal opportunity for advancement. It also had in effect an affirmative action program that called for the recruitment of and encouragement of minorities to apply for promotion. That portion of the personnel policy that called for the posting of job vacancies was essential to the Respondent's affirmative action policy. Employees of the City, such as petitioner, legitimately could expect that the respondent would abide by its own employment policies. *Hishon* v. *King & Spalding*, —— U.S. ——, 104 S. Ct. 2229 (1984). The district court recognized that the failure of respondent to follow its own employment policies was indicia of discrimination (C.A. App. at 84) but held that it was not per se illegal. The recommendation and appointment of Allen Joines to the Public Safety Coordination position and the appointment and filling of the other positions sought by petitioner was equivalent to bird-dogging. As Judge Hoffman sitting with the Fourth Circuit Court of Appeals stated:

> Practices similar to updating and bird-dogging applications have been condemned by this court. Word-of-Mouth hiring, which the district court found to be (the employer's) primary method of recruiting new over-the-road drivers, is discriminatory because of its tendency to perpetuate the all-white composition of a work-force. *Barnett* v. *W. T. Grant Company*, 518 F.2d 543, 549 (4th Cir. 1975). In addition, the use

> of subjective criteria, such as recommendations of employees, has been criticized: "Non-objective hiring standards are always suspect because of their capacity for masking racial basis (sic)." Id. at 550. *EEOC* v. *Ford Motor Co.*, 645 F. 2d 183, at 212, (J. Hoffman Concurring opinion) (4th Cir. 1981)

The district court's finding of legality is in direct conflict with this court's opinion in *Hishon* v. *King & Spalding*, —— U.S. ——, 104 S. Ct. 2229 (1984) where this court held that an employer may provide its employees with benefits that it is under no obligation to furnish by express or implied contract. Such benefit may qualify as a privilege of employment under Title VII that may not be granted or withheld in discriminatory fashion. In the case at bar, the Respondent contracted to provide petitioner with equal opportunity for advancement in accordance with its policies. This court should review the practice of bird-dogging in light of its decision in *Hishon* v. *King & Spalding*, —— U.S. ——, 104 S. Ct. 2229 (1984).

3. In *Anderson* v. *City of Bessemer City, North Carolina*, 470 —— U.S. ——, 84 L. Ed. 2d 518 (1985), this court reaffirmed the "clearly erroneous" standard of review. Implicit in the court's holding was a recognition that there must be some evidence in the record to support a finding. In the case at bar, the district court made findings that were predicated upon evidence or testimony that had been stricken from the record. (C.A. App. at 357-358; C.A. App. at 470-471). In finding of fact # 3, the district court found that John P. Bond, a black male and former Deputy City Manager, had chosen Gary Brown, a white male as Evaluation Director in 1972 because of his familiarity and not because of race. (C.A. App. at 70) Bond did not testify at trial (C.A. App. at 70) and the testimony by Gary Brown as to the reason for his selection was stricken. (C.A. App. at 470-471) Thus it could not be the basis of a factual finding.

Similarly, the court made inferences that were not supported by the factual evidence (C.A. App. at 78). See F.R.C.P., Rule 52.

In finding of fact # 11, the district court found that Acting City Manager Cutright was concerned over plaintiff's morale as an employee, as well as the pending lawsuit (C.A. App. at 78). No evidence was introduced to form a factual base from which this inference could arise. Therefore it was without a factual foundation. The court's reliance on a hypothetical statement made some two years after the incident in question, during a deposition as a basis for finding no retaliation where the witness disavowed making the discriminatory statement that he couldn't offer petitioner a position as Acting Director because of his lawsuit was also error (C.A. App. 429-430). This court in the exercise of its supervisory power should assume jurisdiction to correct a misapprehension of the evidentiary standard to be applied in reviewing the district court's findings under the clearly erroneous standard of review.

4. In *Anderson* v. *City of Bessemer City, North Carolina*, 470 U.S. ——, 84 L. Ed. 2d 518, 106 S. Ct. (1985), this court set forth those circumstances in which "clear error" should be found on appellate review of findings of fact.

> This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. See, e.g., *United States* v.

> *United States Gypsum Co., supra*, at 396. But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. Cf. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 413 (C. A. 2 1945) *Orvis* v. *Higgins*, supra, at 539-540.

At trial, respondent articulated as reason for failure to consider petitioner for the appointment of Public Safety Coordinator that Allen Joines was a displaced department head. Petitioner offered into evidence on the issue of pretext, a memorandum dated May 2, 1978 from Allen Joines to the City Manager some two months before the appointment which indicated (1) prior discussions between Powell and Joines about the appointment; and (2) Joines had the opportunity to accept the new position or remain in his position as Evaluation Director (C.A. App. at 653-654). During this same period, the Community Development Department's evaluation functions were being expanded. Federal funds were being used by respondent. Thus, the documentary evidence belies the testimony that would support the court's findings. An additional finding contradicted by the objective evidence is the district court's findings that petitioner's experience in budgetary matters was limited. In the same breath, the district court found that from December 1971 through December 1972, petitioner had assumed the additional duty of Deputy Model Cities Director in charge of budgeting and was responsible for preparing budgets for fifty five agencies in addition to being evaluation and information officer. (C.A. App. at 69). He had assisted in preparing the budget for respondent from 1972 until the present. Perhaps, the most obvious indication that the trial court's findings were clearly erroneous was in the failure to appoint petitioner to positions in the Community Development Department. The trial court

found that the other persons were selected because they were better qualified. The reason articulated at trial by respondent was that petitioner failed to apply. Petitioner offered into evidence exhibits 30, 31, and 32 which indicated he had applied, and had been interviewed. In *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981), this Court quoting from *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) reaffirmed the inference of discrimination that arises where an employer has failed to articulate a reason for its rejection of plaintiff or the reason set forth by the employer is shown to be pretextual:

> May succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas*, 411 U. S., at 804-805, 36 L Ed 2d 668, 93 S. Ct 1817.

In *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), this court also recognized that irrefutable evidence that an employer has failed to select the most qualified candidate may be probative and is indeed relevant, on the issue of pretext. In its findings of fact, the district court found that Fran Clark, a white female, was better qualified than the petitioner for the position of Community Program Development and Evaluation Coordinator (C.A. App. at 76). At the time of selection, petitioner had been employed by the respondent eight years. During those eight years, he had done the first city wide urban renewal housing study for respondent. The study was used to plan the Community Development Department (C.A. App. at 185) had done Manpower Analysis, (C.A. App. at 160), had done Neighborhood Team Policing Report (C.A. App. at 162), had served for six years as an Evaluation Officer of the City of Winston Salem, had served as Acting Director of the Model Cities Program (C.A. App. 152-153), had served

as third person in the chain of command in charge of orientation and assessment of the Concentrated Employment Program (C.A. App. at 148); had completed thirty hours of a sixty hour program towards a doctor's degree and had completed planning and evaluating training. (C.A. App. at 582) As an evaluation officer petitioner's job entailed designing, planning and implementation of evaluation systems where he planned, implemented, and managed the city's first Evaluation Office for 20 months as an evaluator with Manpower; petitioner had spent the first six months planning and restructuring the Manpower Program. (C.A. App. p. 160). Petitioner planned and implemented the city's first Emergency Employment Program for CETA participants. The sole evidence as to the qualifications of Fran Clark was that she had been a CETA participant, or at most that she had limited planning experience (C.A. App. at 75-76; 183-184; 367). The findings of fact of a trial court may be set aside when clearly erroneous. *Pullman Standard* v. *Swint*, 456 U.S. 273 (1982). Findings of fact are clearly erroneous when although there is evidence to support it the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Anderson* v. *City of Bessemer City, North Carolina*, 470 U.S. ——, 84 L Ed 2d 518, (1985).

In its finding of fact #15, the district court found that the claims plaintiff would label as retaliatory were no more than common disagreements.[5] The uncontradicted testimony was that after the filing of his lawsuit, petitioner's office was placed in a 6 x 6 storage room where persons would come and store boxes. This evidence itself was enough to establish a prima facie case of

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[5] Petitioner alleged retaliation and harassment in obtaining excused sick leave, failure to type a research paper, denial of leave time to attend a professional meeting, changing of his telephone number, relocation of his office, and failure to be appointed to the positions of Human Service Director in 1980 and City Secretary in 1980.

retaliation under the test established in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), petitioner was entitled to a directed verdict where respondent failed to articulate a reason for the solitary confinement.

CONCLUSION

The petition for a writ of certiorari should be allowed.

Respectfully submitted,

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February 24, 1986

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1132(L)

CURTIS E. DIXON,

versus *Appellant,*

CITY OF WINSTON-SALEM, N.C.; ORVILLE W. POWELL; A. R. BEATY and T. W. FREDERICKS,

and *Appellees,*

WAYNE A. CORPENING; LARRY D. LITTLE, VIVIAN H. BURKE; VIRGINIA K. NEWELL; EUGENE F. GROCE; ROBERT S. NORTHINGTON, JR.; ERNESTINE WILSON and JOHN J. CAVANAGH,

Defendants.

No. 85-1139

CURTIS E. DIXON,

versus *Appellee,*

CITY OF WINSTON-SALEM, N.C.; ORVILLE W. POWELL; A. R. BEATY and T. W. FREDERICKS,

and *Appellants,*

WAYNE A. CORPENING; LARRY D. LITTLE; VIVIAN H. BURKE; VIRGINIA K. NEWELL; EUGENE F. GROCE; ROBERT S. NORTHINGTON, JR.; ERNESTINE WILSON and JOHN J. CAVANAGH,

Defendants.

Appeals from the United States District Court
for the Middle District of North Carolina,
at Winston-Salem

Hiram H. Ward, Chief District Judge—(C/A 79-565)

Argued: November 4, 1985 Decided: November 27, 1985

Before WINTER, Chief Judge, SNEEDEN, Circuit Judge, and HILTON, United States District Judge for the Eastern District of Virginia, sitting by designation.

W. Steven Allen for Appellant/cross-appellee; Anthony H. Brett (Roddey M. Ligon, Jr.; Womble, Carlyle, Sandridge & Rice on brief) for Appellees/cross-appellants.

PER CURIAM:

After plenary trial, the district court gave judgment for the City of Winston-Salem and several of its officers in plaintiffs' suit under 42 U.S.C. §§ 1981, 1983 and 2000e in which he claimed racial discrimination in defendants' failure to appoint him to any of several desirable positions which became vacant from time to time. Defendants, after prevailing on the merits, sought and were denied an award of attorney's fees. Plaintiff and defendants both appeal and we affirm.

The issues raised by plaintiff, i.e., the failure to appoint him and a claim of retaliation when he claimed racial discrimination, raise essentially factual questions. The district court found that racial discrimination was not practiced against plaintiff when others were appointed to the positions he sought, and the district court found that there had been no impermissible retaliation.

From our review of the record, we cannot say that these findings were clearly erroneous or that there was any error of law.

Similarly, we do not think that the district court's findings with respect to the award of attorney's fees claimed by defendants or the exercise of its discretion with respect thereto may properly be disturbed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

C-79-565-WS

CURTIS E. DIXON,

Plaintiff

v.

CITY OF WINSTON-SALEM, NORTH CAROLINA, ORVILLE W. POWELL, A.R. BEATY, T.W. FREDERICKS, individually and in their representative capacities as officers of the City of Winston-Salem, North Carolina,

Defendants

[Filed Jan. 30, 1985]

JUDGMENT

The Court tried the claims of plaintiff Curtis E. Dixon against defendants City of Winston-Salem, North Carolina, Orville W. Powell, A.R. Beaty, and T.W. Fredericks in this case without a jury on October 4-6, 1984. Pursuant to Rule 52, Fed.R.Civ.P., the Court made Findings of Fact and Conclusions of Law, filed contemporaneously herewith, wherein it held that judgment on the claims should be rendered for the defendants.

NOW, THEREFORE, pursuant to the Findings of Fact and Conclusions of Law filed herein, IT IS ORDERED and ADJUDGED that plaintiff have and re-

cover nothing from defendants and that his claims in this action be, and the same hereby are, DISMISSED.

/s/ Hiram H. Ward
United States District Judge

January 30, 1985.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

C-79-565-WS

CURTIS E. DIXON,

Plaintiff

v.

CITY OF WINSTON-SALEM, NORTH CAROLINA, ORVILLE W. POWELL, A.R. BEATY, T.W. FREDERICKS, individually and in their representative capacities as officers of the City of Winston-Salem, North Carolina,

Defendants

[Filed Jan. 30, 1985]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court tried the claims of plaintiff Curtis E. Dixon against defendants City of Winston-Salem, Orville W. Powell, A.R. Beaty, and T.W. Fredericks (collectively referred to as "City") in this action without a jury on October 4-6, 1984. Post-trial memorandums in lieu of closing arguments were submitted to the Court on November 30, 1984. Plaintiff alleged in his Complaint (September 12, 1979), as supplemented (January 26, 1982) and amended (June 15, 1983 & July 8, 1983),[1] that de-

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[1] While the Court granted plaintiff's motion for leave to amend, plaintiff neglected to file an amended complaint. Nevertheless, in

fendants failed to select him for various jobs in city government, refused to reclassify his job position, and harassed him because of his race and in retaliation for complaints of discrimination in violation of 42 U.S.C. §§ 1981, 1983, and 2000e (Ttile VII) and the first, fourth, fifth, ninth, thirteenth, and fourteenth amendments to the Constitution. At trial, plaintiff limited his challenge to nine promotions or positions he did not receive and several miscellaneous acts of retaliation. Because any relief to which plaintiff is entitled may be obtained under sections 1981 and 1983 and Title VII, the Court need not address whether plaintiff suffered a violation of any right independently secured by the constitutional amendments alleged in the Complaint but thereafter omitted from all future references in pleadings and at trial. Having duly considered the parties' oral and documentary evidence, the Court now enters its Findings of Fact and Conclusions of Law thereon.

FINDINGS OF FACT

1. Plaintiff, a black male, is employed by the City. He received a bachelor of science in mathematics from North Carolina A & T State University in 1961. Following approximately eight years in the military, plaintiff returned to North Carolina A & T and received a master's degree in mathematics in 1973. Between 1974 and 1977, plaintiff completed thirty-six semester hours toward a sixty hour doctoral degree in administration at the University of North Carolina at Greensboro. He received a master's degree in public affairs from UNC-G in December 1979.

2. Plaintiff entered the City's workforce in 1970 as a program evaluation officer for the Model Cities Program.

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light of the Order allowing the amendment and the legal theories on which the case was tried, the Court will deem the Complaint amended to include claims pursuant to 42 U.S.C. §§ 1981 and 1983.

The Model Cities Program was, in essence, the coordinating and administrative body for approximately fifty-five federally funded municipal programs. As an evaluation officer, plaintiff designed and implemented a program to monitor the success of the funded programs to ensure accountability of the federal funds. For six months plaintiff also served as deputy director of Model Cities and in that capacity was responsible for the budgets of all the individual programs.

3. In 1972, plaintiff was transferred from the Model Cities Program to the City's newly created evaluation office. In creating this office, the City expanded evaluation of local programs and the use of federal funding. Plaintiff worked as a senior program evaluation analyst under the supervision of Gary Brown, a white male hired as evaluation director. Plaintiff contends that he was passed over by the City as director because of his race. Evidence regarding the time-barred selection of Brown was offered as background in an attempt to demonstrate a pattern of refusals to promote plaintiff to positions for which he was the best qualified.

John P. Bond, a black male and former deputy city manager who did not testify at trial, made the decision to hire Brown. Brown had worked for the federal government for approximately three and one-half years prior to coming with the City, six months with the Department of Health, Education and Welfare and twenty-two months with the Department of Housing and Urban Development (HUD). Brown served as a community development representative for HUD, representing a number of HUD programs in which the City participated. In that capacity, Brown had worked closely with Bond for nine to ten months.

Plaintiff had experience in performing the duties required of the evaluation analyst for he had performed similar duties in a commendable fashion for the Model Cities Program. He did not apply for the unadvertised

directorship of the evaluation office but testified he would have applied had he been aware of the vacancy. The explanation for the selection of Brown rather than plaintiff or anyone else lies in the circumstances explaining plaintiff's incognizance of the "vacancy." Bond desired to establish an evaluation office which in large part would be concerned with the City's use of federal money. Having worked with Brown as a HUD representative, Bond was familiar with Brown's qualifications and because of that familiarity, not because of race, chose him as the evaluation office's first director. The Court does not credit the testimony that upon assuming this position Brown expressed shock over the selection and allegedly characterized plaintiff as much more qualified. Brown, who came to Winston-Salem specifically for this position, had no recollection of any such comment. At the time this statement was allegedly made, Brown had not even had a sufficient opportunity to judge plaintiff's qualifications.

4. In 1977, Brown became community development coordinator, thus creating a vacancy in the evaluation office. Plaintiff and Joe Sauser, a white male, were at that time serving as senior program evaluation analysts. Section 3(a) of the City's Personnel Manual indicates that whenever possible a " 'promote-from-within' policy of promoting city employees to higher positions will be followed subsequent to internal vacancy announcements." The office of the city manager had the authority to deviate from this policy and simply announce the appointment in the same manner as the vacancy would have been announced. Plaintiff's Exhibit No. 11 at 2. The City also had in effect an affirmative action program to recruit qualified employees and to make internal and external minorities aware of opportunities for promotion and employment. Plaintiff's Exhibit No. 18.

Defendant Orville Powell, a white male and city manager from 1972-79, selected Allen Joines, a white male,

to replace Brown as the evaluation office director. The position was not advertised, and plaintiff would have applied for it had he known it was vacant. Announcement of the appointment's exemption from the notice procedure did not occur during the few months immediately surrounding Joines' May 1977 appointment.

Joines had been with the City since 1971. He received a master's degree in public affairs prior to employment with the City. Joines had held numerous administrative positions with the City. As of 1977, he had served as an administrative assistant in the budget department, assistant to the mayor, assistant to the city manager, and senior assistant to the city manager. Because Joines had been a member of Powell's staff, Powell possessed first hand knowledge of Joines' abilities. Powell considered Joines to be a person with a logical, analytical mind who did many things well. Joines had worked in and with numerous areas of city government, and some of his experience was relevant to evaluation. He did not, however, have the years of direct experience in evaluation which both plaintiff and Sauser possessed. The preponderance of the evidence shows that plaintiff was a more than adequate evaluation analyst and did quality work. The most significant shortcoming was that at times his work was not completed in a timely fashion. Nevertheless, outgoing director Brown informed plaintiff and Sauser that he had not been consulted by Powell regarding his replacement and that both plaintiff and Sauser, particularly plaintiff, had the qualifications to assume the director's role.

The qualifications of plaintiff, or for that matter Sauser, were not considered by Powell. The Court finds, however, that Powell's failure to notice the vacancy or consider and select plaintiff for the position was not a result of plaintiff's race. Powell simply chose Joines because he was acutely aware of Joines' administrative

capabalities and versatility and believed Joines would serve the City's needs in that position.

5. Plaintiff testified that following Joines appointment as evaluation office director, Brown told plaintiff that chances for plaintiff's promotion were not good because of the way the City treated blacks with regard to administrative positions. Additionally, Plaintiff's Exhibit No. 3 shows that Brown was openly concerned over racial attitudes among city employees. However, when considered in the context in which these statements were made, neither statement rationally suggests that the City favored Joines over plaintiff because of his race. The annual performance review, Plaintiff's Exhibit No. 3, was made more than two years prior to Joines' appointment. Brown had nothing to do with any personnel decision which at that time affected plaintiff. Bond, defendant Al Beaty, and Florence Creque are all black and were in administrative positions prior to 1977. Five of seven administrative positions filled between January and November 1980 went to blacks. Defendant's Exhibit No. 2 (memorandum prepared by plaintiff). While evidence of the City's racial makeup of administrative positions was certainly incomplete, that offered belies any contention that Brown's statement following Joines' appointment, even if made, had any reasonable basis in fact. Without additional evidence, the Court cannot find that statements by an employee not responsible for the decisions plaintiff challenged at trial are sufficient evidence of unlawful motivation.

6. The creation of the evaluation office had in large part resulted from a need to monitor the City's many federally funded programs. When direct funding for the programs diminished, so did the need for evaluation. To a city with tight fiscal constraints, the valuation office became somewhat of a luxury. Consequently, the City eliminated Joines' director position and merged the eval-

uation office with another department which plainly was not a luxury—budget.

Since 1975, Thomas W. Fredericks, a white male, had been the budget director charged with preparing the City's operating and capital improvemment budgets. He had earned a master's degree in public affairs in 1972. Fredericks had only limited experience in evaluation and management studies. By the same token, plaintiff's experience in budgetary matters was limited. He had performed budgetary duties for approximately six months in the Model Cities Program and at times was temporarily assigned to the budget office, as were personnel of many other departments, to assist in budget preparation. The evaluation functions of the merged budget and evaluation department were secondary. Of three persons who had previously had evaluation responsibilities, only plaintiff remained. Thus, it was reasonable that the City should weigh budgetary abilities heavier than those for evaluation in selecting the department director.

Plaintiff testified that he would have applied for this directorship had it been advertised. The position was not advertised because for all practical purposes there was never a vacancy. The position of director of evaluation had been eliminated and in effect Powell simply gave Fredericks, already budget director, additional responsibilities. With those additional duties came a pay range classification increase. The fact that prior to the merger plaintiff was classified a range higher than Fredericks did not warrant bumping Fredericks from a department head position nor did it make plaintiff more qualified for a position which emphasized budgetary matters over matters of evalaution.

7. Upon the 1978 merger of budget and evaluation and the elimination of his position, Joines became a displaced department head. During this same time period, the City was preparing to implement a recommendation

of a study commission that someone be designated to provide administrative direction and support to the City's coordinated police and fire departments. (These functions were later absorbed by the assistant city manager and the position was eliminated).

Once again, the City did not advertise this vacancy. Its availability was not, however, unknown to Joines who lobbied Powell for the appointment. Plaintiff's Exhibit No. 19. After consultation and agreement with Beaty, Powell chose Joines to be public safety coordinator.

Joines had been exposed to several police and fire department matters in his prior administrative positions. As evaluation director, he also served as staff to the citizen public safety study commission whose recommendations were adopted by the board of aldermen. An isolated disciplinary suspension resulting from Joines' off-duty conduct with some of his employees was minor and did not detract from his abilities.

Plaintiff also possessed a certain familiarity with police and fire department operations by virtue of several studies he had conducted involving, or on behalf of, said departments. However, plaintiff's current position was not being eliminated. Considering the City's desire to avoid a layoff if possible and Joines' tested qualifications in administrative positions, Joines was chosen for the position. Race was not a factor in the decision.

8. In the summer of 1978, Gary Brown, then community development coordinator charged with obtaining federal block grants and coordinating their use, became director of the newly-formed community development department. As director, he had the responsibility for filling four staff positions. Plaintiff applied for all four positions. Plaintiff's Exhibit No. 30. One of the positions was not filled and another went to a black person. Plaintiff does not suggest the presence of discrim-

ination or retaliation in the City's decision regarding these two positions.

Joseph Sauser was named to the assistant director, community development/program development and control post. Although Brown did not recall specifically considering plaintiff for this position, Plaintiff's Exhibit No. 30 shows that Brown interviewed plaintiff. Sauser, called as a witness by plaintiff, praised plaintiff's abilities in evaluation matters. Sauser testified that plaintiff had worked in the evaluation office longer than he and the scope of plaintiff's work, insofar as the variety of city projects and departments each conducted evaluations of or for, was broader than his own. Ironically, therein lies the reason for Sauser's appointment to the community development position. Sauser was not as versatile as plaintiff because his evaluation experience was concerntrated in the area of community development. However, Sauser's lack of versatility was more than compensated for by his greater level of familiarity and expertise in the community development area. The extent of his direct experience motivated Brown's decision, not race.

9. Following advertisement, receipt of numerous applications, and several interviews, Brown chose Fran Clark, a white female, as the community development/program development and evaluation coordinator. Plaintiff testified that Brown informed him that Clark's experience made her a better candidate for this particular position. The Court finds this as a fact. Brown described this position as one primarily involved in planning. Clark had worked in the city planning department and came to Brown with a favorable recommendation from her supervisor. Additionally, she had previously been employed in a Comprehensive Employment and Training Act (CETA) planning position in Pennsylvania. Plaintiff testified, though not unequivocally, that Clark had only been a CETA participant. Brown did not qualify Clark's CETA experience in this respect. The Court

finds that even if Clark was only a CETA participant, this did not make her less qualified than plaintiff. Brown received a good recommendation for Clark based on her previous planning experience. This combined with her CETA planning experience to make her the better qualified applicant. Race was not a factor in plaintiff's rejection.

10. In 1979, the working relationship between plaintiff and budget and evaluation office director Fredericks deteriorated so that both felt plaintiff's transfer would be beneficial. In September 1979, plaintiff suggested to city manager Powell that he be assigned as an assistant to the city manager. Plaintiff stated that he did not want to be transferred or assigned to the community development department, human relations department, or human services department. Defendant's Exhibit No. 4. Shortly thereafter, Powell resigned as city manager, and as of that time plaintiff had not been transferred. Powell did, however, discuss plaintiff's desired transfer with Lewis Cutright, a white male who had worked in numerous administrative positions since becoming a city employee in 1953 and who was named acting city manager in October 1979 pending selection of a new manager by the board of aldermen. Cutright consented to the transfer and placed plaintiff directly under him in the manager's office. The Court finds that this transfer was made primarily to alleviate a difficult situation in the budget and evaluation office, not to fill a job opening. Consequently, plaintiff had few concrete job responsibilities and felt under-utilized. He did prepare organizational charts of the city employee structure. Defendants' Exhibit No. 1.

11. In spite of plaintiff's representation that he was not interested in any position in the human services department, Defendants' Exhibit No. 4, he contends that he was unlawfully denied both the acting and permanent directorship of that department. Inasmuch as the city

manager makes department head appointments, Cutright had the responsibility for filling the vacancy at the top of the human services department. Because Cutright was to be city manager only temporarily, he did not want to make any permanent appointments. Accordingly, the human services vacancy was filled on an acting basis only. Since it was an acting position, the vacancy was not posted or advertised. Rather, Cutright asked Joe Herman Berrier, then assistant city manager over the human services department, for a recommendation. With Berrier's recommendation, Cutright appointed Walter Farabee, a black male.

Berrier did not formally seek applicants or conduct interviews for the position. Instead, he looked for a suitable transfer candidate with the City. Farabee was the suitable candidate. He had served as coordinator of economic development activities for the City and had pertinent administrative and supervisory experience gained in private sector employment. Cutright was interested in filling the acting directorship with someone who would not be interested in the permanent position. Cutright testified he had no idea that Farabee would apply for the permanent position. The deposition of Berrier, which was received in evidence, indicates that Berrier knew Farabee might become interested in the permanent position. However, the Court finds that Berrier's knowledge does not vicariously render Cutright's explanation for not selecting plaintiff as acting director unworthy of belief. Farabee had not worked in the human services department before and in Cutright's mind was an interim administrator to keep the department functioning until such time as the new manager permanently filled the position. Cutright had no way of knowing who the new city manager would permanently appoint, and he knew from his experience as acting police chief and acting city manager that persons appointed on an "acting" basis often did not receive the permanent appointment.

According to plaintiff, Cutright told plaintiff that he was better qualified than Farabee but could not be offered the position because of his lawsuit. Cutright had no recollection of any such statement and plainly denied that any retaliatory motive existed against plaintiff. In fact, Cutright testified that if he was going to offer plaintiff that or any other position, he would have contacted the lawyers involved to determine if a promotion could settle the lawsuit. The Court does not find this to be indicia of retaliation. As acting city manager, of course Cutright was concerned over a pending lawsuit against the City. However, he was simultaneously concerned over the impact it had on plaintiff's morale as an employee. Cutright's hypothetical "settlement offer" illustrates his honesty and practicality. The Court is convinced that no retaliatory motive played a part in selection of the acting director of human services.

12. Bryce A. Stuart became the new city manager in January 1980. Plaintiff's assignment in the manager's office continued. Stuart discussed plaintiff's previous problems with and charges against the City and informed him that they were exactly that—previous. In Stuart's mind, plaintiff had a clean slate.

13. In April 1980, Stuart considered five or six applicants, including plaintiff, for the permanent director position in the human services department. Farabee, the black male made acting director by Lewis Cutright, was chosen. Stuart found Farabee qualified through his background and experience and was particularly impressed with Farabee's performance as acting director.

Stuart did not know that Cutright chose an acting director whom he thought would not be interested in the permanent position. The fact that Farabee in fact became interested is not evidence of retaliation because Stuart's decision was independently made based on Farabee's proven qualifications. The Court finds Stuart's testimony that his rejection of plaintiff was not tainted by retaliatory or discriminatory intent credible.

14. Plaintiff also applied for the position of city secretary in 1980. Plaintiff's characterization that he was "eminently qualified" fails when compared with the qualifications of Sanders Hudson, the white male who was selected. The city secretary is secretary to the board of aldermen. He is responsible for maintaining all records for and from the board of aldermen. He prepares their agenda and minutes, and generally facilitates the flow of their meetings. Hudson had gained a general working knowledge of somewhat similar administrative duties as administrative assistant to the public works director. Additionally, he had served as secretary to the board of aldermen's public works committee doing essentially the very nature of work which was required of the city secretary. Plaintiff's additional seniority in evaluations of approximately two years did not make him more qualified than Hudson. The decision to appoint Hudson, made by Stuart after consultation with Beaty, was not influenced by race or retaliation.

15. Plaintiff filed his first charge with the Equal Employment Opportunity Commission on July 7, 1978. He contends that subsequent to that filing, the City retaliated against him in several respects. The Court finds no retaliation. With respect to the June 1981 two week sick leave request, the City understandably sought documentation greater than that presented by plaintiff. Plaintiff's Exhibits Nos. 5-9 illustrate that the City merely sought reasonable compliance with its employee sick leave policy, not that plaintiff was being harassed. There is also insufficient evidence to substantiate plaintiff's claim that his frequent office and telephone changes were retaliatory. The renovations to city hall and plaintiff's own job changes resulted in these changes.

In the early summer of 1980, plaintiff, who was dissatisfied with his workload in the city manager's office, was assigned to work on an energy conservation project. Plaintiff was also dissatisfied with this assignment, feel-

ing that he lacked needed technical expertise. Technical expertise came from an engineer assigned to the project. The City felt that plaintiff was qualified to contribute to the project but unduly delayed it. The claims plaintiff would label as retaliatory were no more than common disagreements and conflicts which arise in the course of employer/employee relationships. Nothing else appearing, the mere fact that they occurred after protected conduct by plaintiff does not make then unlawful. The same may be said of plaintiff's testimony concerning a denial of two hours leave to attend a professional meeting. Leave was not possible because plaintiff's job required that he attend a budget meeting. Evidence on the one other incident set forth in plaintiff's Post Trial Memorandum (criticism of plaintiff by Fredericks to other employees) and those apparently abandoned in the Memorandum (notification of duties through secretary, work during Christmas holidays, refusal of secretary to type one personal paper) was patently insufficient.

DISCUSSION

Plaintiff alleged disparate impact and disparate treatment because of race retaliation for his charges and complaints of discrimination in violation of 42 U.S.C. §§ 1981, 1983 and 2000e. The Court has jurisdiction to hear these claims pursuant to 28 U.S.C. § 1343(a)(4).

To establish disparate or adverse impact on a protected group under Title VII, a discriminatory motive need not be proven, but a plaintiff must show that a facially neutral employment policy or practice had a significantly disproportionate impact on the protected group. If such a prima facie case is shown, the employer must demonstrate manifest job relatedness of the policy. *Connecticut v. Teal*, 457 U.S. 440, 446-47, 102 S.Ct. 2525, ——, 73 L.Ed.2d 130, 137 (1982); *Cuthbertson v. Biggers Brothers, Inc.*, 702 F.2d 454, 461-62 n.3 (4th Cir. 1983). By definition, the employment practice questioned in an ad-

verse impact challenge affects a large group of persons rather than just the individual plaintiff. For that reason, statistical evidence is often paramount. B.Schlei and P.Grossman, *Employment Discrimination Law* at 1324 (2d ed. 1983). Nevertheless, the principle focus of Title VII is protection of the individual employee, as opposed to a minority group. *Connecticut v. Teal*, 457 U.S. at 453-56, 73 L.Ed.2d at 141-43.

Plaintiff's attempt to show disparate impact amounted to little more than mentioning it as a theory of recovery. The City's appointments to some positions without notice perhaps presented the potential for some evidence of adverse impact, but plaintiff offered little or none. In the absence of sufficient evidence of disparate impact, plaintiff's recovery depends on proof of unlawful disparate treatment.

In a disparate treatment case, the factual inquiry is whether the employer intentionally discriminated against the employee because of race. *United States Postal Service v. Aikens*, 460 U.S. 711, ——, 103 S.Ct. 1478, ——, 75 L.Ed.2d 403, 410 (1983). The flexible scheme of proof contemplated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 92 S.Ct. 1817, 36 L.Ed.2d 668 (1973), guiding the inquiry in Title VII actions is also applicable to claims of unlawful retaliation and claims of discrimination under sections 1981 and 1983. *Lewis v. Central Piedmont Community College*, 689 F.2d 1207, 1209 n.3 (4th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); *Burrus v. United Telephone Co.*, 683 F.2d 339, 343 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982). It is well suited for analyzing the evidence in this case.

In order to prove disparate treatment the claimant must first make a prima facie showing of racial discrimination, which is accomplished by production of evidence of actions by the employer which permit an inference that, more likely than not, those actions were based unlawfully on the claimant's race. If the claimant makes

this showing, then the burden of production shifts to the employer to articulate, through the introduction of admissible evidence, a clear and reasonably specific legitimate, nondiscriminatory reason for its actions. The articulation of such a reason dispels the adverse inference arising from the claimant's prima facie showing and entitles the employer to judgment unless the claimant can show that the stated reasons are pretexts for discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). A claimant can show pretext by "persuading the court that a discriminatory reason more likely motivated the employer or . . . the employer's proffered explanation is unworthy of credence." *Texas Department of Community Affairs v. Burdine,* 450 U.S. at 256, 101 S.Ct. at ——, 67 L.Ed.2d at 217. Such evidence must support with "substantial" or "reasonable probability," as distinguished from "possibility" or "speculation," the claimant's contention that the employer's proffered explanation is pretextual. *Fink v. Western Electric Co.,* 708 F.2d 909, 916 (4th Cir. 1983). The burden of persuasion remains throughout on the claimant.

To prove retaliation a claimant must similarly establish a prima facie case and if it is rebutted must show the employer's reasons to be pretextual. A prima facie case of retaliation is accomplished by establishing (1) protected activity by the claimant, (2) occurrence of adverse employment action, and (3) presence of a causal link between the protected activity and the adverse action. *Payne v. McLemore's Wholesale and Retail Stores,* 654 F.2d 1130, 1136 (5th Cir. 1981), *cert. denied,* 455 U.S. 1000 (1982); *Grant v. Bethlehem Steel Corp.,* 622 F.2d 43, 46 (2d Cir. 1980). In the absence of direct or sufficient circumstantial evidence, *see Cline v. Roadway Express, Inc.,* 689 F.2d 481, 485 (4th Cir. 1982) (prima facie case may be proved under ordinary principles of proof without resort to *McDonnell Douglas* presumptive inference), the causal connection may be demonstrated

through evidence which justifies an inference of retaliatory motive. Such evidence may include protected conduct closely followed by adverse employment action. *Burrus v. United Telephone Co.*, 683 F.2d at 343.

Plaintiff contended at trial that he was unlawfully denied nine positions, six solely because of his race, two in retaliation for protected conduct, and one on combined grounds of race and reprisal. One position, that of evaluation director given to Gary Brown in 1972, was filled outside the 'imitations period applicable to this action. *King v. Seaboard Coast Line Railroad Co.*, 538 F.2d 581, 584 (4th Cir. 1976) (statute of limitations for claims under 42 U.S.C. §§ 1981 and 1983 governed by state law —three years pursuant to N.C.Gen.Stat. § 1-52(5)); 42 U.S.C. § 2000e-5(e)(f)(1) (timely filing of Title VII charge and action). While evidence of Brown's selection was relevant, *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1985, ——, 52 L.Ed.2d 571, 578 (1977), it did not illustrate a discriminatory background to the timely relevant claims or otherwise bolster plaintiff's case.

Plaintiff established a prima facie case as to each of the positions he contends were denied him on racial grounds. While his qualifications for evaluation director were greater than those for the other positions, his evaluation experience had exposed him to a variety of city operations such that he was at a minimum facially qualified for the other positions. Plaintiff did not formally apply for all of these positions, but he sufficiently established that he would have applied had notice of the vacancy been provided. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) (lack of a formal application resulting from employer discrimination does not bar claim).

The appointments of evaluation director, budget and evaluation director, and public safety coordinator were made by Powell without prior vacancy announcement.

Consequently, plaintiff, as well as all other potential applicants, regardless of race, were not given an opportunity to seek formal consideration. While this seemed to follow a consistent pattern in upper level administrative positions, it is of considerable concern to the Court because the failure to post job vacancy notices and the lack of objective guidelines for hiring and promition may be indicia of discrimination. *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972).

The City's personnel policies provided that the city manager could make appointments without prior vacancy announcement. In such cases, it is contemplated that the appointment be announced in the same manner as a vacancy. Plaintiff's Exhibit No. 11. The appointments of evaluation director, budget and evaluation director, and public safety coordinator were made without due announcement, either of the vacancy or the appointment. The City's failure to follow its own policies is of additional concern to the Court for as plaintiff points out, the failure to follow one's normal procedures can also be indicia of discrimination. *Williams v. DeKalb County*, 577 F.2d 248, 255, *modified*, 582 F.2d 2 (5th Cir. 1978).

The City's failure to announce these three openings, however wise or unwise it may have been, was not per se illegal. *Roman v. ESB, Inc.*, 550 F.2d 1343, 1354 (4th Cir. 1976) (no showing that absence of job posting resulted in discrimination). It did, however, cause the Court to give extraordinary review to the appointments. After careful scrutiny, the Court finds that the City presented legitimate, nondiscriminatory reasons why plaintiff was not appointed to any of these three positions and that the evidence does not establish any of the proffered reasons as pretextual. Simply put, Joines was chosen evaluation director because he was Powell's ally or crony. This is not to say that Joines was not a capable administrator. He had proven that through his prior work with

Powell or under Powell's observation. On the other hand, there is evidence that both plaintiff and Sauser, a white male, were better qualified in evaluation than Joines. However, comparative qualifications were not the reason for appointment of Joines. Powell admitted he did not consider plaintiff.[2] The reason plaintiff (or for that matter Sauser) was not considered is because unlike Joines, he had not been fortunate enough to illustrate his abilities to Powell and procure Powell's confidence. Yet, this is not discrimination on the basis of race. An employment decision challenged in a race discrimination action is not legitimate only if it is based on race.[3] *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, ——, 57 L.Ed.2d 957, 968 (1978) (an illegitimate con-

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[2] There was evidence of Joines' qualifications and plaintiff sought to impeach those qualifications with evidence of "bad acts." However, inasmuch as Powell testified he did not recall considering plaintiff to be evaluation director, the City's suggestion (in Defendants' Proposed Findings and Conclusions (Post-Trial Revision) at 15 & 19 (November 19, 1984)) that the relevant question with respect to this job turns on comparative qualifications is misplaced. Powell's effective disclaimer of considering plaintiff essentially makes the comparative qualifications a reason not proffered by the City. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. at 254 n.9, 67 L.Ed.2d at 216 n.9.

[3] Plaintiff cites *Harris v. Birmingham Board of Education*, 712 F.2d 1377, 1383 (11th Cir. 1983), which states that under a selection process which failed to post vacancies and significantly utilized subjective criteria, "no legitimate reason can be shown." The Court cannot apply this broad statement to the instant case. While a selection procedure may be a vehicle for carrying out discrimination, in this case it did not foreclose all legitimate reasons for the City's actions. A particular selection procedure is not per se unlawful; it is the result, the ultimate employment decision which, is potentially unlawful. *Roman v. ESB, Inc.*, 550 F.2d at 1354. While employers may be well advised to operate under a job posting or other procedure which maximizes the opportunity for applicant consideration, they "need not prove that [they] pursued the course which . . . allow[ed consideration of] the *most* employment applications." *Furnco Construction Corp. v. Waters*, 438 U.S. at 577, 57 L.Ed. at 968.

sideration is one such as race). Powell's familiarity with Joines was the reason Joines was selected, or in other words plaintiff was "rejected." This is a credible legitimate, nondiscriminatory reason, and the evidence does not establish it as pretextual. *Lamphere v. Brown University*, 685 F.2d 743, 750 n.2 (1st Cir. 1982) (rejection of argument that friendship is not a legitimate reason); *Waters v. Furnco Construction Corp.*, 688 F.2d 39, 40 (7th Cir. 1982) (on remand from Supreme Court) employer's use of list of persons with whom he had previously worked was a legitimate, nondiscriminatory reason).

While the position of budget and evaluation director was filled without advertisement, Powell's selection of Tom Fredericks is readily justified. The emphasis in the new budget and evaluation office was budget. Fredericks, then in charge of the budget office, retained his budget responsibilities, for which he was better qualified than plaintiff,[4] and simply assumed additional duties in evaluation. The Court is persuaded by Powell's testimony that in his mind, the position was never really open and that there was no reason to consider anyone other than Fredericks to continue administration of the budget office and assume new but decreasing duties in evaluation.

Powell approached the public safety coordinator position in a fashion similar to his 1977 appointment of evaluation director. Once again, he relied on a familiar

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[4] Plaintiff correctly pointed out in its post trial memorandum that the city may not rely on comparative qualifications as a nondiscriminatory reason when the evidence shows plaintiff was not considered for a particular position. See footnote 2 *supra*. When such is the case, a nondiscriminatory reason may be found, if at all, only through evidence apart from the contended superior qualifications of the appointee. However, this does not mean that relative qualifications of various individuals played no part in this case. Plaintiff testified as to his own qualifications and his perception of others abilities. Consequently, the City had a right to offer qualifications of its employees.

administrative face, Allen Joines. However, at that time, Joines had yet another factor in his favor (and against plaintiff and all those who might have applied for this position); he was a displaced department head. Powell's selection of Joines again was not motivated by any discriminatory intent.

With respect to the community development positions, plaintiff argues he is entitled to recover because the evidence demonstrates the City's proffered reasons to be false. The Court disagrees. The proffered reason for the rejection of plaintiff for these positions was the superior qualifications of Sauser and Clark based on greater experience in particular areas related to the specific job duties of the positions. Brown testified that he did not recall whether plaintiff applied for these positions. If this was all the evidence showed, the Court could not accept the proffered reason. However, it shows more. Notwithstanding Brown's failure of recollection, he did admit to interviewing several candidates and Plaintiff's Exhibit No. 30 confirms that plaintiff was interviewed for the assistant director position and applied for the community development evaluation coordinator position. Thus, the superior qualifications of Sauser and Brown have not been shown to be a pretext for discrimination.

Plaintiff feels that the City effectively "sandbagged" his chance to become human services director. Cutright explained why he discouraged plaintiff and others from applying for the acting position. Unfortunately for plaintiff the very thing which he feared, that the acting director would gain an advantage in the new manager's mind for the permanent position, occurred. Nevertheless, the Court recognizes the reason behind Cutright's explanation and finds him to be a credible witness. Cutright discouraged applications from plaintiff and all others whom he thought were interested in the permanent position. While his concern to avoid influencing the new manager backfired, potentially to plaintiff's detriment, it did so in the absence of unlawful motivation.

Plaintiff's challenge to the city secretary position is his weakest. He argues in his post trial memorandums that an inference of retaliation arises from the fact that the position was awarded to junior employee (by approximately two years) who held no higher degrees in public administration. Plaintiff himself testified to the contrary on direct examination, stating that Hudson received a master's degree in public administration the same month he received the post. Moreover, mere seniority is outweighed by more direct experience. *Young v. Lehman*, 748 F.2d 194 (4th Cir. 1984). With this position and others, plaintiff testified that he was "eminently qualified" for the promotion. However, an employee's perception of himself is not relevant. "It is the perception of the decision maker which is relevant." *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980). Hudson was chosen because of the City's perception of his superior qualifications, not plaintiff's race or protected activity.

Finally, the miscellaneous acts of alleged retaliation presented a prima facie case but only because chronologically they occurred after plaintiff filed his E.E.O.C. charges and/or lawsuit. The evidence, when considered in terms of the *McDonnell Douglas* proof scheme or under ordinary modes of proof, fell markedly short of establishing anything more than a paltry inference of retalaition. No inference of retaliation existed at the close of all the evidence.

Consideration of the defendants' request for attorney's fees pursuant to 42 U.S.C. §§ 1988 and 2000e-5(k) need not await future submission to the Court in accordance with Local Rule 210. A prevailing defendant may be awarded counsel fees only when the plaintiff's claim is "frivolous, unreasonable, or groundless." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S.Ct. 694, ——, 54 L.Ed.2d 648, 657 (1978), *quoted in Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762, 100 S.Ct. 2455, ——, 65 L.Ed.2d 488, 498 (1980). Although plaintiff

has not prevailed, the Court cannot say that plaintiff's action was unreasonable or without foundation.

CONCLUSION

1. The Court has jurisdiction over the parties and their dispute.

2. The defendants did not refuse to consider or select plaintiff for any employment position or otherwise treat the plaintiff unfavorably because of his race or claims of discrimination against the defendants. 42 U.S.C. §§ 1981, 1983, & 2000e.

3. The defendants are not entitled to attorney's fees. 42 U.S.C. §§ 1988 & 2000e-5(k).

A Judgment for defendants wil lbe entered accordingly.

/s/ Hiram H. Ward
United States District Judge

January 30, 1985.

APPENDIX D

The relative qualifications of Petitioner and the persons appointed were:

Position Sought	Type	Advertised or Posted	Employees	Year Hired by City	Seniority	Education	Experiences	Exper Yrs Adm/ Supv	Yrs Work Exper	Other
Eval Dir 72	Adm/Supv	No	Dixon (B)	1970	Yes	B.S. Completed Course Work for M.S. Plan & Eval Trng	LT- CPT USAF- 7½, Div Opns, Dev & Trng (CEP-Manpower) 1½ yrs, Eval Officer 1½ yrs, Deputy Dir. MC ½ yr	10½	11	Graduated Magna Cum Laude Earned Bronze Star Medal, 2 tours in Vietnam Planned implemented and managed City's first Eval. Off for 1½ yrs Completed the City's first evaluation plan
			Brown (W)	1972	No	B.A.	Carpenter 3 mos SGT USA 4½ mos Epidermologist 6 mos Mgnt Trainee 1 yr Hous. Spec 1 yr Comm Dev Rep- 10 mos	None Given	4	Graduated with honors
Eval Dir 77	Adm/Supv	No	Dixon (B)	1970	Yes	M.S. Completed 36 Semester hrs toward Doctorate in Adm Completed Eval Director's Trng	Same as above Sr. Prog. Eval Planning, implementing, evaluating and managing Program in housing, manpower police, etc.	10½	16	Same as above Received very good to superior performance rating 7 years City Evaluation Exp.
			Joines (W)	1971	No	M.P.A.	Adm Asst Sr. Adm Asst	1	6	No City Evaluation Exp. Limited Supv Experience. Sold Beer illegally at Streetscene in 1977 according to Fredericks testimony

* Eval —Evaluation
Dir —Director
Trng —Training
Comm —Community
USAF —United States Air Force
Dev —Development
Mgnt —Management
Rep —Representative
Supv —Supervisor
LT —Lieutenant
Prof —Professional
Edu —Education
CD —Community Development
CPT —Captain
MC —Model Cities
Opns —Operations
USA —United States Army

Position Sought	Type	Advertised or Posted	Employees	Year Hired by City	Seniority	Education	Experiences	Exper Yrs Adm/ Supv	Yrs Work Exper	Other
78 Public Safety Coordinator	Adm/Supv	No	Dixon (B)	1970	Yes	Same as above	Special planning and evaluation assignment with Police Fire Opns	10½	17	Completed Team Policy Evaluation Plan. Completed Fire Opns Stud that saved thousands of dollars.
			Joines (W)	1971	No	Same as above	Special assignments with Police Dept	2	7	Suspended 5 days from his job for drinking beer with subordinates while on duty.
Budget & Eval Dir.	Adm/Supv	No	Dixon (B)	1970	Yes	B.S., M.S. Completed Planning & Eval Tech. Tng Completed Eval Dir Tng Completed 36 semester hrs toward Doctorate in Adm	Evaluation Officer Deputy Dir. MC in charge of Budgeting. 8 yrs budgeting & Evaluation Experience	10½	17	Budget & Evaluation Experience at the adm/supv
			Fredericks (W)	1972	No	M.P.A.	Adm Asst Budget Dir.	3	6	No City Eval. Experience. Sold Beer illegally at Streetscene in 1977 and was counselled
Asst Com Dev Dir	Adm/Supv	Yes *	Dixon (B)	1970	Yes	B.S., M.S. Completed Planning & Eval Tech Trng Completed Eval Dir Trng Completed 36 semester hrs toward Doctorate in Adm. Housing Trng	Evaluation Officer. Deputy Director MC in charge of Budgeting 8 years Budgeting evaluation experience Housing planning & Eval. Experience from 1970-78	10½	17	Completed the City's first Housing Impact Study which was used to form CD Dept.
			Sauser (W)	1972	No	B.A. Completed Some Graduate Studies	Planner Sr. Planner Sr. Program Eval Analysis	2	6-8	Considered Dixon to be the most qualified for 1977 Eval Dir. based on his people analytic and writing skills

Position Sought	Type	Advertised or Posted	Employees	Year Hired by City	Seniority	Education	Experiences	Exper Yrs Adm/ Supv	Yrs Work Exper	Other
Program Dev & Eval Coordinator	Prof/Supv	Yes *	Dixon (B)	1970	Yes	Same as above		10½	17	Received very good to Superior performance rating from Brown, the selecting Officer Played major role in the establishment of the CD Dept Planned and implemented Employment Program (CETA)
			Clark (W)	1978	No	None Given	CETA Planner in PA CETA Participant with city	None given did not testify	amount not noted	Past Supervisor in PA said she was a good worker
Human Service Director	Adm/Supv	Yes	Dixon (B)	1970	Yes	B.S., MS & M.P.A. 36 Semester hrs toward doctorate in administration	Director, Opns Dev & Trng (CEP—Manpower) 1½ yrs Mgnt Consultant for Human Service Dept-2 yrs Planned, implemented 1 million Dollar Emergency Employment Programs	10½	9	Planned, implemented and assisted with the management of The Human Services (Manpower) Dept, Completing budgets, operation procedures, designing floor space, getting manpower programs started from 1974-76
			Farabee (B)	1975	No	B.S. & M.S. in Edu Adm	Chemistry Teacher Goodwill Coordinator Economic Development Coordinator with city	Not given did not testify	Not Noted Specifically	Relieved of his Economic Development duties in Jan 1979. Had no Manpower Experience when assigned duties as Acting Human Service Director and was considered less qualified than Dixon by Joe Berrier, the

* Dixon applied but Brown testified that Dixon did not apply and that he (BROWN) did not consider Dixon for any position

Position Sought	Type	Advertised or Posted	Employees	Year Hired by City	Seniority	Education	Experiences	Exper Yrs Adm/ Supv	Yrs Work Exper	Other
			Farabee (continued)							Superior over the Human Services Dept. Had only the Human Services Dept. Had only 5 months learning experience in Manpower compared to Dixon's 4 yr of planning implementation evaluation and management experience in Manpower

This position was filled in 1980 as a Retaliatory action against Dixon.